



Public Employees for Environmental Responsibility

2001 S Street, NW • Suite 570 • Washington, D.C. 20009 • 202-265-PEER(7337) • fax: 202-265-4192
e-mail: info@peer.org • website: http://www.peer.org

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SEP 5 2000

September 5, 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
Portals II
445 12th Street, SW
Suite TW-A325
Washington, D.C. 20554

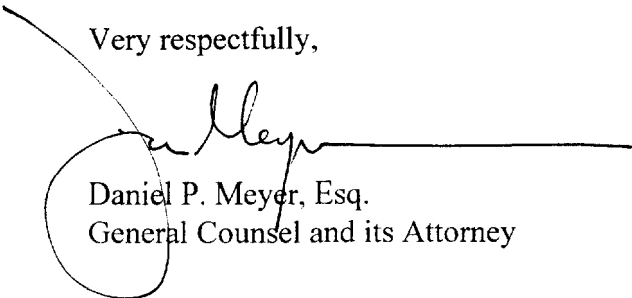
Re: Proceeding No. RM-9913, *FCC Accountability and Responsibility for Environmental Transgressions, and Petition for Rulemaking Regarding the NEPA, NHPA, and Part 1, Subpart I of the Commission's Rules*

Dear Ms. Salas,

Enclosed for filing in the above referenced docket are an original and four (4) copies of the *Reply of Public Employees for Environmental Responsibility (PEER)*, submitted in response to industry *Comments* following the Commission's *Public Notice* issued in File No. RM-9913. See Report No. 2426, Consumer Information Bureau, Reference Information Center, *Petition for Rulemaking - Filed* (RM No. 9913)(July 14, 2000).

Should you have any questions, please contact the undersigned at (202) 265.7337.

Very respectfully,


Daniel P. Meyer, Esq.
General Counsel and its Attorney

Enclosure

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Before the Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In Re the Telecommunications Industry's)
Environmental Civil Violations in U.S. Territorial)
Waters (South Florida and the Virgin Islands))
and along the Coastal Wetlands of Maine:)
FCC Accountability and Responsibility for)
Environmental Transgressions, and Petition for)
for Rulemaking Regarding the NEPA, NHPA, and)
Part 1, Subpart I of the Commission's Rules)

Dkt. No. RM-9913

To the Secretary, Federal Communications Commission:

REPLY OF PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY (PEER)

Daniel P. Meyer
Public Employees for Environmental Responsibility (PEER)
2001 S Street, N.W. — Suite 570
Washington, D.C. 20009

Tele: (202) 265.7337
Facs: (202) 265.4192
E/ml: dmeyer@peer.org

Its General Counsel and Attorney
District of Columbia Bar No. 455369

September 5, 2000

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SUMMARY

The defensive proposition that we are too far into the telecommunications revolution and have invested too much in infrastructure to change our fallen ways is just that: a statement backed by not a single citation of law. Indeed, the American courts "are committed to the proposition that when a major [F]ederal action is undertaken, no part may be constructed without an EIS. *Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039 at 10 [LEXIS pagination]. This judicial principal exists in order to prevent federal Agencies from placing themselves in precisely the circumstance in which the FCC now finds itself. Lumbering under environmental rules designed for a status quo ante revolution, the Commission now finds itself lacking in fidelity to the NEPA. Industry has acknowledged the need to redress the failings of the Commission environmental rules.

Indeed, no better contrast in the changing nature of our regulated activity is available than in a comparison of Tycom Networks (US), Inc's *Comments* with the record PEER has compiled of environmental violations in the U.S. Virgin Islands, the comments of Reefkeeper International on the sensitivity of the Florida reefs, and the now-environmentally incorrect statement Tycom cites to from 1974. At one time, we thought DDT was a life-saving elixir, that Agent Orange was the solution to a just war, and that thalidimide was good for a baby's health. Compare the Clinton Administration's record on coral reef preservation with the statement cited by Tycom and one sees why the categorical exclusion for submarine cable landing licenses needs to go the way of that other oddity of 1974, the Mood Ring.¹

The correction will be painful, and costly, but the law is not administered to some, and not others, simple because it costs. One is not permitted to chose between compliance with the Telecommunications Act of 1996 and the National Environmental Policy Act of 1969. The salutary effects of "competition" are understood but they need not be advanced to the detriment of the environmental policy goals of the United States Government. PEER believes that timely action by all parties hereby petitioned can bring the FCC and the telecommunications industry into compliance with the law. A rulemaking is required to save the reefs, and PEER repetitions so.

¹*Compare* In Re Petition for Rulemaking of Public Employees for Environmental Responsibility, *Comments of Tycom Networks (US), Inc.* (RM-9913)(Aug. 15, 2000) at 4 *with* Reefkeeper International, Letter in Support i.c.o. PEER Petition, RM-9913 (Sept. 1, 2000).

Before the Federal Communications Commission

WASHINGTON, D.C. 20554

**In Re the Telecommunications Industry's
Environmental Civil Violations in U.S. Territorial
Waters (South Florida and the Virgin Islands)
and along the Coastal Wetlands of Maine:**

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Dkt. No. RM-9913

**FCC Accountability and Responsibility for
Environmental Transgressions, and Petition for
for Rulemaking Regarding the NEPA, NHPA, and
Part 1, Subpart I of the Commission's Rules**

REPLY OF PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY (PEER)

Introduction. The filing of the PEER *Petition for Rule Making* ("PEER Petition") was atypical of the manner in which environmental groups usually engage substantive rulemaking before the Federal Communications Commission ("FCC" or "Commission"). Most petitioners come before the FCC objecting to an alleged, prospective harm a FCC "major Federal action" will impart to the environment.² PEER worked the process from the other end of the equation. Our members in the

²The FCC has entertained individual petitions to comply with NEPA on a case-by-case basis. See, e.g., Leelanau, Mich., Applications for Licenses in the *Private Land Mobile and Operational Fixed Microwave Radio Serv.*, 9 F.C.C. Rcd. 6901 (Nov. 4, 1994) (FCC deferred to interpretation of National NPS with respect to tower affecting Sleeping Bear Dunes National Lakeshore); *Application of Weigel Broadcasting Company to Modify the Authorized Facilities of WDJT-TV, Milwaukee, Wisc.*, 11 F.C.C. Rcd. 17202 (May 17, 1996) (FCC deferred to opinion of Army Corps of Engineers and U.S. Fish and Wildlife Service regarding the construction of a tower near a floodplain). In these cases, the FCC defers to required to the agency holding particular expertise in evaluating the potential environmental impacts. Oddly, for actions relating to the Appalachian

field—notably PEER Florida and their friends in the U.S. Virgin Islands—came to PEER and asked, “given that telecommunications companies are currently damaging the environment in, and around, our near shore coral reefs under the colour of authority from the FCC, how can the FCC claim its environmental rules maintain fidelity to the National Environmental Policy Act of 1969 (“NEPA”)?”

This is the question the FCC must ask, and answer, through the *Notice of Proposed Rule Making* (“NPRM”) issued to answer the *PEER Petition*. It was the AT&T Corporation’s disrespect of the environment which trigger the *PEER Petition*. One would imagine the spotlight of public notice and commentary would stay the hand of past offenders. But, incredibly, while K Street lawyers have spared over the *PEER Petition*, AT&T Corporation has offended the environment once again. On August 2, 2000—while its regulatory counsel was commenting on the *PEER Petition*, AT&T Corporation was cited for yet another environmental violation damaging the coastal zone of the U.S. Virgin Islands at Magen’s Bay, St. Croix.³ While the Commission has often begged away its duties under the NEPA by stating that its actions would have no affect on the environment, AT&T has precluded that tactical maneuver with respect to the *PEER Petition*. The violation is real, it is palpable, and FCC environmental rules, crafted to enable the NEPA, would have prevented this most recent violation from happening.

Trail, the NPS would be the expert agency. Nevertheless, the FCC has been unwilling to accord the NPS significant deference in determining whether and to what extent NEPA compliance would be necessary in siting telecommunications towers adjacent to the Appalachian Trail. In fact, the FCC has wholly co-opted the decision about whether to engage in NEPA analysis, without regard to the expectations of its peer agency, the NPS. James J. Vinch, *The Telecommunications Act of 1996 and Viewshed Protection for the National Scenic Trails*, 15 J. LAND USE & ENVTL. LAW 93, 137-140 (1999) *citing* Interview with Rita Hennessy, Assistant Director, National Park Service, Appalachian Trail Project Office (Sept. 25, 1998); Internal Memorandum from Ron Singer, Department of the Interior, Fish and Wildlife Service, Division of Refuges (Mar. 9, 1998) (on file with author). This particularly damning memorandum is reported to conclude that “the FCC has attempted to bypass NEPA responsibilities with respect to the siting of telecommunications towers that may affect National Wildlife Refuges.” *Id.* at n.294.

³See Chris Larson, *Environmental violations cost AT&T \$100,000 fine*, V.I. Daily News (Aug. 18, 2000)[Attached as Exhibit I]. Compare In Re Petition for Rulemaking of Public Employees for Environmental Responsibility, *Response of AT&T Corporation* (RM-9913)(Aug. 14, 2000) at 6 (accusing PEER of “Distorting AT&T’s environmental record”).

Let us underscore this point: the *PEER Petition* was launched by concerns within the scientific community over past industry environmental violations. While we have been commenting upon the *PEER Petition*, renewed violations have been committed. *See supra* (detailing the latest fining of AT&T Corporation, imposed by the Government of the U.S. Virgin Islands midway through this Comment period for the *PEER Petition*).

Interest. PEER acknowledges its failure to state its interest in the present proceeding, as is required by Section 1.401(c) of the Commission's rules.⁴ Petitioner hereby begs the Commission to incorporate this statement of interest into its Petition after-the-fact, or, in the alternative, give PEER permission to amend its Petition to insert the following. Petitioner Public Employees for Environmental Responsibility ("PEER") is a national non-profit corporation based in Washington, D.C. with chapters throughout the United States, including the States of Maine and Florida, where substantive environmental violations have occurred under the colour of the Commission's authority. PEER represents current and former federal and state employees of land and ecosystem management, wildlife protection, and pollution control agencies who are frustrated by the failure of federal and State agencies to enforce their statutory environmental mandates.

PEER members working for government agencies are frequently conflicted by their duties as employees of a federal agency, and their ethical duties to faithfully execute the laws of the United States. Frequently, it is a PEER member who observes first hand the seedier side of regulatory transactions and is left feeling compromised by the process. As such, PEER members in Florida and Maine are relying on PEER to present this Petition. PEER members and staff regularly utilize the nearshore coral reefs, coastal wetlands and forests, and Blue Ridge highlands currently subject to environmental violations of the telecommunications industry. These resources are now diminished for their observational, research, aesthetic enjoyment, and other recreational, scientific and educational activities. PEER brings this activity on behalf of itself and its adversely affected

⁴See In Re Petition for Rulemaking of Public Employees for Environmental Responsibility, *Opposition of Global Crossing Ltd.* (RM-9913)(Aug. 14, 2000) at n.3.

members.⁵

The Responsibility lies with the Portals. PEER will not argue the presence of many other levels of environmental review by State and local authorities.⁶ They are not bound by NEPA; the FCC is bound by the same. If industry wants to suggest ways in which State and local environmental reviews may be submitted to the FCC to validate industry's self-certification on various applications, PEER will be more than glad to endorse such a strategy. PEER members conduct those reviews!

Now that the Commission has been noticed of industry's environmental violations, the FCC has a rare and singular opportunity to rise above ministerial lip-service to the letter of NEPA and meet the spirit of that law.⁷ PEER does concede that NEPA is a procedural statute which mandates a process rather than a specific result. *Sierra Club v. Espy*, 38 F.3d 792, 796 (5th Cir. 1994); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978). And, sadly, the NEPA "does not prohibit the undertaking of federal projects patently destructive of the

⁵PEER acknowledges the presence of its General Counsel at the center of the environmental cause in both the present proceeding and the *AT&T/Burkittsville* proceeding. Such disclosure admits no wrongdoing in being hired because one is good at what one does. There is no AT&T Repeater Station in the lee of South Mountain, and there will be no Allegheny Energy electrical substation for the same reason. See In Re Petition for Rulemaking of Public Employees for Environmental Responsibility, *Opposition of Global Crossing Ltd.* (RM-9913)(Aug. 14, 2000) at n.6. Indeed, the ideas crafted to defend the lee are now being reviewed for legislation in two southern States. Deregulation carries with it a concomitant change in status from protected to unprotected commercial player. That is the basis of the "public"/"private" utility distinction.

⁶See In Re Petition for Rulemaking of Public Employees for Environmental Responsibility, *Opposition of Global Crossing Ltd.* (RM-9913)(Aug. 14, 2000) at 9.

⁷We call two-timers "repeat offenders". Compare *Government of the U.S. Virgin Islands v. AT&T of the Virgin Islands, Inc, Notice of Violation* (NOVA-05-00-STT)(Aug. 2, 2000) with *Government of the U.S. Virgin Islands v. AT&T of the Virgin Islands, Inc, First Amended Complaint* (Civil No. 1997/142)(Oct. 6, 1997)[Attached as Exhibit II] with In Re Petition for Rulemaking of Public Employees for Environmental Responsibility, *Response of AT&T Corporation* (RM-9913)(Aug. 14, 2000) at 6 (accusing PEER of "Distorting AT&T's environmental record").

environment; it simply mandates that the agency gather, study, and disseminate information concerning the projects' environmental consequences. *Sabine River Authority v. United States Dep't of the Interior*, 951 F.2d 669, 676 (5th Cir. 1992). But given the excellent profit margins afforded by the Telecom Act of 1996, it is too much for the public to ask industry to absorb its own externalities? Why should the people of the Virgin Islands, or Maine and Florida, bear the environmental costs of AT&T's rent-seeking? And once noticed of industry transgressions, why should the FCC continue to violate Federal law by allowing further trespass of the law once citizens have identified the practice?

What should not distract the Commission at this point is the rather snarled technological categories criss-crossing this proceeding. While PEER has been primarily focused on the deleterious affects of submarine cable laying in the Caribbean Ocean, the *PEER Petition* explicitly cast a wide seine in order to catch the fishy environmental impacts of Section 214 Authority, communications tower erections, and other major Federal actions by the FCC. Criss-crossing the various technologies promoted by major Federal actions of the FCC are a host of laws which support the FCC's mission. The Commission must not only implement the Communications Act of 1934, and subsequent revisions, but must also abide by the NEPA and other environmental statutes. When PEER cites to examples among the various technologies, and to legal requirements of the various environmental statutes, it does so with but one objective: to underscore the general failure of the FCC's environmental rules across the board.

I. INDUSTRY HAS FAILED IN ITS ATTEMPT TO CAST THE *PEER PETITION* AS LACKING IN SUFFICIENCY FOR THE ISSUE OF A NOTICE OF PROPOSED RULEMAKING IN THIS PROCEEDING.

It is important to note that PEER is not required to prove conclusively that the matters presented in the *PEER Petition* frame a legal and factual problem directing a change in the rules themselves. PEER is merely required to present sufficient evidence that a reasonable chance of environmental harm will occur if the Commission continues to take major Federal actions under its present environmental rules. "Sufficient evidence" is adequate evidence justifying Commission action, in this case the issuing of a *Notice of Proposed Rule Making* in answer to the *PEER Petition*. See BLACK'S LAW DICTIONARY 1601 (4th Ed. 1951) *citing* Pensacola & A. Ry. Co., 5 So. 833, 835 (noting that "the term [sufficient] is not synonymous with 'conclusive'"). Industry commentators have assumed, erroneously, that the threshold standard of review rises to "conclusive".

The FCC accepts Petitions under the mandate of one Basic Law (constitutional) provision, and a related legislative regime. The First Amendment prevents administrative agencies from denying the public the right to present the Commission with proposals for regulatory reform. This is a qualified right. The federal Government is not required to listen to its petitioners. The right to petition for redress of wrongs is a right to present. *See* U.S. CONST. amend 1. (1789); *Minnesota Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984); *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979). More specifically, Congress has enabled the First Amendment through the Administrative Procedures Act of 1949("APA"), which requires the federal Government to listen to, consider, and act with reasonable promptness on such proposals. 5 U.S.C. §§ 551-59 (1999). The APA and its peer "citizen-suit" statutes advance the right to petition for the issuance, amendment and repeal of agency rules. When the Commission decides whether or not to grant the *Peer Petition* by issuing a *Notice of Proposed Rule Making* —or by taking action through other decision-making proceedings—it must consider the merits of the *PEER Petition* and decide what

action to take in response.⁸

As for the Commission's standard of review for the *PEER Petition*, and its accompanying burden of proof, the clarity of Title 47, *Code of Federal Regulations*, is somewhat lacking. PEER does request that any elaboration of Commission action on the *PEER Petition* be accompanied by a substantive discussion of the standard of review and burden of proof applied to the *PEER Petition*.⁹ In general, a petition may:

contain a substantial amount of supporting information and argumentation. The agency may itself possess the same or other information that supports or undercuts the proposal made in the petition. That information may be located in a particular agency file or the accumulated expertise of staff members. On the other hand, the petition may be largely barren of the type of data needed for adequately evaluating the merits. It is this latter situation which may present a particularly difficult issue for the policy maker. The agency (or more accurately some responsible official) must decide whether and to what extent it will try to collect information deemed necessary for the disposition of the petition on the merits in an informed manner. At times, public comment may elicit what the agency needs. In other cases, studies — some extensive and expensive — may have to be done by the agency or its

⁸UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 38-65 (1947); 1986 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES RECOMMENDATIONS AND REPORTS 493, 522, 525-26, 533, 538.

⁹The Commission should not assume these matters to be covered by the APA: "As with other procedural matters, each agency is generally in the best position to determine the needed scope and nature of procedural elaboration. The agency must consider, among other things, the substantive mandates of the statutes which it administers, the nature of the sector of the public which it serves or regulates, and the degree to which uniqueness may characterize the matters raised in petitions in light of the considerations suggesting that the agency should (or should not) commit its petition process to writing. For example, if the organic statute creating the program the agency administers requires the agency to make designated findings of fact or scientific fact before adopting a particular standard, a requirement that the petitioner submit certain types of technical information or address certain issues of law or fact may expedite processing of the petition and save agency resources along the way." William V. Luneburg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WIS. L. REV. 1, 25-26 (1988). PEER suggest that the Commission's elaboration of standards of review and burdens of proof could use some refinement. Our numerous exhibits—attached to the *PEER Petition, Comments*, and this *Reply*—have been supplied in the spirit of such a needed refinement.

contractors.¹⁰

The specific point supported by Professor Luneberg's general observations is that unless a clearly articulated standard of review, and an accompanying burden of proof, are codified or issued for the matter presented in the present proceeding, PEER has presented evidence sufficient to meet the needs of the over-arching statutory requirements. The PEER Petition and subsequent Comments included substantial supporting data, have asked for rules of specific content, have presented further questions of use in a rulemaking proceeding, and have otherwise focused this issue for the decision by the FCC.

It is axiomatic that the APA does not provide the substantive criteria to "cabin decisions for denying petitions for rulemaking" and where they exist, "such criteria must be found . . . in other statutes or agency policy statements." William V. Luneburg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WIS. L. REV. 1, 43 (1988). But to be acted upon through the granting of an NPRM or other avenue of substantive reform, the *PEER Petition* must allow the agency to make factual findings "supported by substantial evidence", which is defined as "less than a preponderance, but more than a scintilla." *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999)[Emphasis supplied]. Such fact finding must be based on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)[Emphasis supplied]; *see also FCC v. Nat'l Citizens Committee for Broadcasting*, 436 U.S. 775, 803, 814-815 (1978). And it must address significant comments made in the rulemaking proceeding. *Alabama Power Co. V. Costle*, 636 F.2d 323, 384-85 (D.C. Cir. 1979).

The generous standard of review suggested by the bounds of "preponderance" and "scintilla",

¹⁰William V. Luneburg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WIS. L. REV. 1, 27 (1988).

and the middling nature of “adequate” are reinforced by the Commission’s own rules, which state, that when a petition is filed, the Commission is to determine whether the petition “discloses sufficient reasons in support of the action requested to justify the institution of a rulemaking proceeding.” 47 C.F.R. § 1.407(a)(1999). *See also, WWHT, Inc. v. FCC*, 656 F.2d 807 (1981) at 22 [LEXIS pagination]. So PEER need not present conclusive evidence nor conclusive questions of law, for that matter. The *PEER Petition* must merely steer a true course between “preponderance” and “scintilla”. The fact that telecommunications providers acting under the colour of FCC authority are being cited—federal permits flapping from their halcyons—for environmental violations keeps the “scintilla” rock to the windward side of the channel. How can proven environmental damage be less than “a spark, a remaining particle; the least particle”? BLACK’S LAW DICTIONARY 1513 (4th Ed. 1951)(stating the definition of “scintilla”). Such damage can be so only if the FCC has consciously decided to abandon the environment in defense of profit maximization.¹¹

¹¹But this does not mean that the FCC is prohibited from acting in the public interest when choosing from the various technical solutions to the buildout of the Nation’s critical infrastructure. Indeed, there is a pro-free market side to the NEPA, one advanced as a principle of law and economics. By promoting the disclosure of environmental costs and the assessment of those costs on those who profit from the environmental damage, NEPA transforms externalities into internal costs. Industry is unable to fatten its margins by soiling the environment of its citizens-cum-consumers. Peter M. Manus, *Natural Resource Damages From Rachel Carson’s Perspective: A Rite of Spring in American Environmentalism*, 37 WM AND MARY L. REV. 381, 404 (1996). Likewise, ample room exists within the public trust doctrine to allow the FCC to adopt pro-environment rules to counter the deleterious affects of its past rule making. Peter M. Manus, *Natural Resource Damages From Rachel Carson’s Perspective: A Rite of Spring in American Environmentalism*, 37 WM AND MARY L. REV. 381, 401-402 (1996) citing Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law; Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Thomas L. Eggert & Kathleen A. Chorostecki, *Rusty Trustees and the Lost Pots of Gold: Natural Resource Damage Trustee Coordination Under the Oil Pollution Act*, 45 BAYLOR L. REV. 291, 298 (1993); Anthony R. Chase, *Remedying CERCLA’s Natural Resource Damages Provision: Incorporation of the Public Trust Doctrine into Natural Resource Damages Actions*, 11 VA. ENVTL. L.J. 353 n.7 (1992).

II. THE SELF-CERTIFYING NATURE OF COMMISSION ACTIONS HAS LEAD TO A DECISION- MAKING ENVIRONMENT WHICH IGNORES THE IMPORTANCES OF REGULATING "CUMULATIVE IMPACTS".

The Commission's environmental rules are obsolete. The Commission has chosen a limiting means of identifying "major Federal actions" within the field of communications law. The obligation to conduct NEPA analysis on, for instance, each individual tower or submarine cable landing, or fiber optic line extension is triggered by the FCC's requirement that each tower and line must be registered with the FCC prior to construction. *See* 40 C.F.R. 1508.18 (1998); *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996) (" [I]f a federal permit is a prerequisite for a project with adverse impact on the environment, issuance of that permit does constitute a major federal action"); *Jones v. Gordon*, 792 F.2d 821, 827-29 (9th Cir. 1986); *Astoria v. Hodel*, 595 F.2d 467, 478 (9th Cir. 1979). *But see* In Re Petition for Rulemaking of Public Employees for Environmental Responsibility, *Reply Comments of Global Crossing* (RM-9913)(Aug. 28, 2000) at 2.¹²

The NPRM issued to answer the *PEER Petition* should query whether the explosive growth in critical infrastructure following the Telecom Act of 1996 has altered decisionmaking at the FCC so as to trip NEPA's concerns with "cumulative impacts". This is why PEER acknowledges that the Commission's environmental rules were drafted to comply with NEPA.¹³ But the market, and the role of the FCC have changed. And so the rules must change. NEPA requires that environmental impact statements address the cumulative impact on the environment of a proposed agency action. The cumulative impact analysis requires the preparer of an EIS to address the

¹²PEER would posit that the current morass in America's cities is, in part, a direct reflection of this phenomenon. The net affect of Commission decision-making on the environment was to through the execution and cost of the Commission's job on the backs of the States. *See* Exhibit III, attached.

¹³*See, e.g.* In Re Petition for Rulemaking of Public Employees for Environmental Responsibility, *Opposition of Global Crossing Ltd.* (RM-9913)(Aug. 14, 2000) at 10; In Re Petition for Rulemaking of Public Employees for Environmental Responsibility, *Worldcom Comments* (RM-9913)(Aug. 14, 2000) at 3.

environmental impact of a proposed action in the context of existing and other proposed activities already impacting the environment in the vicinity of the proposed action. 40 C.F.R. § 1508.25(a)(1999); *see also* Baltimore Gas & Elec. Co. V. Natural Resources Defense Council, Inc., 462 U.S. 87, 106-7 (1983).

The FCC finds itself in this position for reasons identified by environmentalist Rachel Carson nearly a half century ago,

One human flaw Carson identifies is the attraction to short term fixes, a propensity that encourages short-sighted and ill-informed decisionmaking. In addition, she points out that when we do engage in study, we rely on private sector industries with profit goals to fund scientific research about the effects and effectiveness of . . . solutions to environmental problems. Indeed, Carson even identifies situations in which we allow private industry to influence our perception of which natural phenomena constitute problems for us and warrant our interference. Carson indicates that due to these and other influences, we have a high, emotionally-fed propensity to underestimate the dangers presented

RACHEL CARSON, SILENT SPRING 13 (1962) *cited in* Peter M. Manus, *Natural Resource Damages From Rachel Carson's Perspective: A Rite of Spring in American Environmentalism*, 37 WM AND MARY L. REV. 381, 401-402 (1996)[Emphasis supplied.].

Carson's words speak volumes to concept of administrative integrity, the process by which a deciding federal Agency ensures the materials and certifications underlying its own analysis are valid. The concept is as important when receiving the registration of a communications tower, as when issuing auctioned spectrum or a submarine cable landing license, as when reviewing the exercise of Section 214 authority as, indeed, it is during the receipt of a complete Draft Environmental Impact Statement ("DEIS") or a Final Environmental Impact Statement ("FEIS"). What federal officials ensures the integrity of accepted documentation:

The role of the private firm in the preparation of the DEIS and the FEIS is particularly troubling in this case because the consulting firm also had a stake in the project which it was evaluating. Although the conflict of interest may not have been illegal under the old Council on Environmental Quality (CEQ) advisory guidelines on EIS preparation, Corps rubber stamping of a consultant prepared EIS is [illegal]. *See Sierra Club v. Lynn*, 502 F.2d 43, 58-59 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975) (permitting a "financially interested private contractor" to participate in EIS preparation, but barring agency abdication of its duties by "reflexively

rubberstamping a statement prepared by others.")

Sierra Club v. Sigler, 695 F.2d 957, 961 (5th Cir. 1983). *But see* In Re Petition for Rulemaking of Public Employees for Environmental Responsibility, *Comments of Tycom Networks (US), Inc.* (RM-9913)(Aug. 15, 2000) at 9.

Can industry distinguish this situation from the numerous times it self-certifies environmental compliance on Commission forms and applications, without submitting evidence sufficient for the FCC to not abdicate its duties? And if the current FCC environmental rules have created a paper regime offense to *Sigler*, *infra*, how can the Commission reform itself? This is yet another question for the *Notice of Proposed Rule Making* issued to answer the *PEER Petition*. As Circuit Judge Gee opined,

We realize that the preparation of an FEIS is a mammoth task and that CEQ and [federal Agency] regulations permit the participation of private consultants. These regulations recognize the reality that private consultants play an important, if some times troubling, role in modern government. *See, e.g.* D. GUTTMANN & B. WILLNER, *THE SHADOW GOVERNMENT* (1976). And, of course, administrative agencies have discretion in the performance of their duties. *See, e.g., South Louisiana Environmental Council, Inc. v. Sand*, 629 F.2d 1005, 1014 (5th Cir. 1980). Nonetheless, an agency may not delegate its public duties to private entities, *see Lynn*, 502 F.2d at 59, particularly private entities whose objectivity may be questioned on grounds of conflict of interest.

Sierra Club v. Sigler, 695 F.2d 957, 963 (5th Cir. 1983).

The rule in *Sigler* presents the Commission with a double problem. How does the FCC ensure the integrity of the environmental assumptions made by others, but central to FCC decision-making? And second, how does the FCC ensure that the industry Applicants presenting those environmental assumptions are themselves trustworthy? Given its record in New England and the Caribbean, is any AT&T Corporation statement on compliance with environmental law now trustworthy? And to the integrity of these partners, the Commission has delegated a public duty, namely, fidelity to the NEPA.¹⁴

¹⁴In the case of coral reefs, PEER has already identified some of the basic causes of denigration. The activities of telecommunications providers are emboldened on the list, attached as Exhibit IV. Note, also, in the Exhibit, the precision with which the Government of the U.S. Virgin

But as for industry's numerous comments suggesting that no "major Federal action" occurs when submarine cable landing licenses are issued and Section 214 Authority is exercised, the Commission needs to recall that "[n]o litmus test exists to determine what constitutes "major Federal action" [and] 'federal courts have not agreed on the amount of federal involvement necessary to trigger the applicability of NEPA.'"¹⁵ This is important to remember, because the cry of "no Major federal action" is the K Street lawyer's first squawk when faced with a pro-environment petition. The knee-jerk reaction is similar to that of the unsuccessful Texan lawyers in the Longhorn Case:

It is not only arbitrary and capricious to assert this combination of actions is not a major Federal action, but it flies blatantly in the face of common sense. Only lawyers could make such an argument with a straight face. Aside from this substantive arbitrariness and capriciousness in finding no major Federal action, the federal agencies' continued downplaying of their individual actions and the absence of any consideration for the combined federal impact on this obviously unitary pipeline project demonstrate the arbitrariness and capriciousness in the procedures applied in consideration of the presence of Federal action.

Spiller v. Walker, 1998 U.S. Dist. LEXIS 18341 at 25 (the "Longhorn Case").

In looking for definitions for "major Federal action", courts regularly look to the regulations of federal agencies, such as the CEQ and the FCC. *Ethel Spiller, et. al. v. Robert M. Walker*, 1998 U.S. Dist. Lexis 18341 (W.D. Texas)(Aug. 25, 1998) at 22. As such, agencies wishing to maintain fidelity with NEPA would take the CEQ regulations and utilize them in rulemaking designed to clarify when those federal agencies are engaged in a "major Federal action."

Islands was able to document the reef damage (maps included).

¹⁵*Save Barton Creek Ass'n v. Federal Highway Admin.*, 950 F.2d 1129, 1134 (5th Cir. 1992)(quoting *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1480 (10th Cir. 1990), *cert denied*, 498 U.S. 1109 (1991)).

**III. THE COMMISSION'S ENVIRONMENTAL RULE NEED TO BE REVISED
TO CORRECT IT UNLAWFUL POSITION ON
"CUMULATIVE IMPACTS" AND "CATEGORICAL EXCLUSIONS".**

Dodging Environmental Law: The Twin Effects of Promoting "Categorical Exclusion" and Ignoring "Cumulative Effects". An important question to answer, therefore, is whether the FCC's categorical exclusion regulations are lawful. The decision as to whether to adopt a categorical exclusion requires that the agency determine the environmental significance of its actions in advance. This analysis is similar to the significance determination agencies make when they decide whether to prepare an Environmental Impact Statement (EIS), and is predicated on establishing the acceptable bounds of the "worst case scenario." See Daniel R. Mandelker, NEPA LAW AND LITIGATION, 7.04(2) (1998); *Cellular Phone Task Force v. FCC*, 205 F.3d 82 (2nd Cir. 2000) at 25-26 [LEXIS pagination].

If the agency finds that the proposed action would not present a significant effect on the human environment, that action may be categorically excluded. See 40 C.F.R. 1508.4 (1999). Categorical exclusions are inappropriate where an action has cumulative impacts, where it presents unique or unknown risks, or where the action is controversial. See *Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986) (holding exception to categorical exclusion because proposed action was environmentally controversial); see also *North Woods v. United States Dep't of Agric.*, 968 F. Supp. 168 (D. Vt. 1997) (finding land exchange with substantial change in use); *Fund for Animals v. Espy*, 814 F. Supp. 142 (D.D.C. 1993) (finding agency merely cited categorical exclusion regulation after complaint filed); *Mississippi ex rel. Moore v. Marsh*, 710 F. Supp. 1488 (D. Miss. 1989); *Greenpeace U.S.A. v. Evans*, 688 F. Supp. 579 (D. Wash. 1987) (holding proposed action controversial).

A "cumulative impact" is defined as

[t]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively

significant actions taking place over a period of time.

40 C.F.R. § 1508.25(a)(2)(1999). Look at the underscored terms. How can this not characterize the extension of wireless and fixed-wired telecommunications networks across the entire United States and its Territories? Is this not evocative of a multitude of Spectrum Auctions and Tower Registrations, individually minor, but, when aggregated, collectively a significant action? Is this not evocative of a multitude of Section 214 Authority actions and Submarine Cable Landing License, individually minor, but, when aggregated, collectively a significant action? See, one can not hype the importance of the impact of the Telecommunications Act of 1996 in order to raise the expectations of the finance industry, and now dodge the logical extension of that rhetoric. The cumulative impact of all these technologies places them outside the protection of NEPA categorical exclusions. 40 C.F.R. § 1508.25(a)(2). *See also, City of Carmel-by-the-Sea v. Dep't of Trans.*, 123 F.3d 1142 (9th Cir. 1997); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214-1215 (9th Cir. 1998). They must fend for themselves, and they must do so through a *Notice of Proposed Rule Making* to answer *PEER's Petition*.

As one academic commentator has pointed out,¹⁶ several potential problems exist with respect to the FCC's environmental rules as they are being applied to the infrastructure build-out prompted by the Telecommunications Act. First, the FCC has not simply excluded from NEPA compliance certain actions "which do not individually or cumulatively have a significant effect on the human environment." *See* 40 C.F.R. 1508.4 (1998). The FCC's categorical exclusion regulations exclude all agency actions except for those that fall into the enumerated list of actions that do trigger NEPA. *See Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality, Report and Order*, F.C.C. 85-626, pp. 11-13 (1986).

Thus, under its own regulations, the FCC must take a hard look at environmental impacts only in those limited circumstances identified in the Commission's rule. In this manner, the

¹⁶James J. Vinch, *The Telecommunications Act of 1996 and Viewshed Protection for the National Scenic Trails*, 15 J. LAND USE & ENVTL. LAW 93, 137-140 (1999).

definition of "major Federal action" is circumvented. The environmental impacts of any other type of agency action—including those having a significant impact on the environment but which are not identified in the FCC's environmental rules— need FCC consideration only if brought to the agency's attention by individual petition under the "safety valve" provision. *See id.* This execution of the law, when coupled with the role delegated to industry (that of "self-certification), leads to a de facto state of NEPA non-compliance.

This enabling of the NEPA unlawfully shifts the burden of compliance from the agency to either industry—if it should chose to report its own malfeasance—or, more likely, to the public. But, the use of categorical exclusions by agencies is not intended to provide an exemption from NEPA compliance. It is merely an administrative tool to avoid paperwork for those actions without significant environmental impacts. *See, e.g., Dinah Bear, NEPA at 19: A Primer on an "Old" Law with Solutions to New Problems*, 19 ENVTL. L. REP. 10060, 10063 (1989); *Washington Trails Ass'n v. United States Forest Serv.*, 935 F. Supp. 1117 (W.D. Wash. 1996) (holding categorical exclusions should be interpreted narrowly because of Congress' expressed intent that agencies comply with NEPA to the "fullest extent possible.").

Clearly, both the hard damage caused by fiber optic cables to nearshore coral reefs, or even the aesthetic and visual damage caused by the erection of telecommunications towers within, say, the Appalachian trail's viewshed, are created by technologies which built incrementally, indeed cumulatively, into a network of technologies. A single erect telecommunications tower, or a single nearshore reef frak-out, may arguably have a de minimis impact on a particular environmental resources (as long as AT&T Corporation is not supervising the subcontractor). However, a single telecommunications tower is functionless without a network of similar towers situated nearby. And a single fiber optic cable is merely the way between two terminii, terminii which serve as hubs to distant parts of a single, cumulative network.

This cumulative impact of this infrastructure build-out along the entire information superhighway will have a pervasive impact on environmental resources. Segmenting a large or cumulative project into smaller individual components so as to obviate the significance of NEPA

impacts is not only a betrayal of the public trust, it is unlawful. See, e.g., *New Jersey v. Long Island Power Auth.*, 30 F.3d 403 (9th Cir. 1994); *Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60 (D.C. Cir. 1987). The statutory term "significantly affecting . . . the human environment" requires a consideration of both context and intensity. "Context" means that "the significance of an action must be analyzed in several different contexts such as" (1) society as a whole, (2) the affected region, (3) the affected interests, and (4) the locality, "including the particular setting of the proposed action". Compare 42 U.S.C. § 4332 (2)(C)(1999) with 40 C.F.R. § 1508.27(a) (1999). "Intensity" refers to the severity of the impact, which will vary depending on the "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas." See 40 C.F.R. § 1508.27(b)(3)(1999).

Likewise, it is equally unlawful for the agency to attempt to shield itself from its NEPA obligations by claiming the benefit of a categorical exclusion based on an artificial analysis of each separate component of a project. See James J. Vinch, *The Telecommunications Act of 1996 and Viewshed Protection for the National Scenic Trails*, 15 J. LAND USE & ENVTL. LAW 93, 138 (1999) citing *Conservation Law Found. of New England v. United States Dep't of the Air Force*, 1987 U.S. Dist. LEXIS 15149 (D. Mass. Nov. 23, 1987) (cumulative impacts of radio towers); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (when several proposals will have a cumulative or synergistic environmental impact, their environmental consequences must be considered together). See also *Heartwood, Inc. v. United States*, (S.D. Ill. Sept. 29, 1999), where a court held that if a particular project might pose cumulative impacts, those impacts must be considered before the agency's adoption of a categorical exclusion for that particular class of projects.

Accordingly, the FCC cannot rely upon the "extraordinary circumstances" exception to the categorical exclusion—40 C.F.R. 1508.4—to analyze the cumulative impacts on a case-by-case basis after the categorical exclusion is promulgated. As such, the Submarine Cable Landing Licenses, the Section 214 Authority, and the auction of spectrum underlying these actions require uniform NEPA compliance, a level of compliance that is not maintained by the FCC's current system of categorical exclusions.

Rooted, perhaps, in their own provincial practice areas, few industry commentators rose above the parsing of words to recognize this fundamental legal fracture regarding the FCC's failure to address the cumulative impact of its actions. Lawyers typically resort to reasoning through analogy to aid their peers mired in these circumstances. And it just so happens that federal case law presents a perfect analogy to a networked system evincing much the same characteristics as the fiber optic cable network: the natural gas/petroleum pipeline.

If we look to such an example based on network "function" rather than legal "form", a model for Commission actions presents itself in the case of *Ethel Spiller, et. al. v. Robert M. Walker*, 1998 U.S. Dist. Lexis 18341 (W.D. Texas)(Aug. 25, 1998). Here, several oil companies and four of their allies among the ranks of federal agencies took the position that no "major Federal action" existed in the transportation of refined gasoline across 700 miles of Texan cities, farms and ranches. As in the case of fiber optic cable laying in the U.S. Virgin Islands, the State of Florida, and in the State of Maine, the "Longhorn Partners Pipeline" under discussion had a mounting history of environmental incidents and violations. And as with many of the fiber optic cable projects processed under Section 214 or the Submarine Cable Landing Act, the federal agencies whose actions were required for the Longhorn project to proceed, "refuse[d] to take responsibility for conducting an environmental impact statement or even a less onerous environmental assessment to analyze the environmental dangers involved in such a pipeline and apparently prefer[red] to allow the pipeline to run without any overall evaluation of the effect such a pipeline could have on the human environment." *Spiller v. Walker*, 1998 U.S. Dist. Lexis 18341 (W.D. Texas)(Aug. 25, 1998) at 4.

As with fiber optic cable laying, more than one federal agency was required to approve various aspects of the Longhorn pipeline. The court focused on the responsibilities of two agencies: Department of Transportation and the Army Corps of Engineers. The FCC was alleged to be a possible defendant in the law suit, but went unnamed. The Commission's nexus to the action was through its VSAT activities, "because [the Commission] would permit and license Longhorn's system of remote, satellite-directed control of an automatic shut-off valve system." As the Commission remained unnamed, the issue of its culpability remained unexamined. *Spiller v. Walker*, 1998 U.S. Dist. Lexis 18341 (W.D. Texas)(Aug. 25, 1998) at 10-11. But the most engaging

similarity between Longhorn and the present proceeding before the FCC is the role of the U.S. Army Corps of Engineers in approving utility networks — systems of carriage — which cross wetlands, coastal zones, and other environmentally sensitive areas.

It is this Nationwide Permit 12 ("NWP 12") which failed the federal agencies before Judge Sam Sparks in the Longhorn case and may well have failed the FCC in the present proceeding.

When several federal agencies are involved in a project, a "lead agency" must be chosen to supervise the preparation of an EIS. 40 C.F.R. § 1501.5. Other federal agencies which have jurisdiction are considered "cooperating agencies," and the lead agency may even request the involvement as "cooperating agencies" of other federal agencies with the expertise in a particular environmental issue, even when those agencies are not directly involved in the project at issue in the EIS. 40 C.F.R. §§ 1501.6, 1501.8 (1999).

Spiller v. Walker, 1998 U.S. Dist. Lexis 18341 (W.D. Texas)(Aug. 25, 1998) at 27.

If we examine the environmental damage caused to the ecosystem by the FCC's program of issuing submarine cable landing licenses, who was the "lead agency"? The FCC? The U.S. Army Corps of Engineers? Global Crossing, Ltd. asserts that the Corps is the lead on many submarine cable landing issues,¹⁷ but how is the FCC integrated into this process? Indeed, how do the Commission's rules integrate the Commission into such proceedings, and who decides when integration must occur?¹⁸ This activity comes under a categorical exception. And yet, identifiable environmental damage has occurred? Where is the paper trail of accountability? How are the Corps decisions independently assessed by the FCC? These are the answers Global Crossing, Ltd. Does not provide. PEER's hunch is that all parties have arrive at this point due to their reliance on Nationwide Permit No. 12, and that program's failure in assessing site-specific concerns.

¹⁷See In Re Petition for Rulemaking of Public Employees for Environmental Responsibility, *Opposition of Global Crossing Ltd.* (RM-9913)(Aug. 14, 2000) at 3.

¹⁸PEER acknowledges, and is well aware of, the Environmental Compliance Group mentioned by PCIA. It would be an excellent model for a Commission-wide Office of Environmental Compliance. Such a suggestion, however, needs to be vetted through the comment and reply process of a Rule Making. See In Re Petition for Rulemaking of Public Employees for Environmental Responsibility, *Comments of PCIA* (RM-9913)(Aug. 14, 2000) at 3.

Indeed, Global Crossing provides an curious comparison. If AT&T Corporation has been fined twice by the same jurisdiction, we can all recognize a nascent pattern of industry failure. And yet, Global Crossing almost admits NWP 12 to be the basis for their self-certifications to the FCC on a variety of matters.¹⁹ If the environmental evaluations underlying NWP 12 are only conducted every five (5) years, can Global Crossing really stipulate to the environmentally-neutral nature of its activities? Do we need to suffer another four (4) years of frak-outs, blow-outs, groundings and tearings before we can all acknowledge administratively what PEER has documented in this proceeding?

The core of the issue here is the FCC's compliance with the CEQ's regulations as they related to the "cumulative impact" of its major Federal actions. The argument PEER has advanced through this proceeding is that fiber optic cable—much like energy pipelines—qualify as "major Federal actions" precisely because of their tentacled nature. As such, the technologies currently under consideration—those administered with Submarine Cable Landing Licenses, Section 214 Authority, and spectrum auctions, are manifestly different than the RF facilities reviewed for cumulative impact in *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2nd Cir. 2000) at 27-28 [LEXIS pagination]. In *Cellular Phone Taskforce*, the lack of cumulative impact was linked to a scientifically-determined absence of aggregate effect on a single person moving through a variety of transmission envelopes. With networked systems (including erect communications towers), the cumulative impact is on the ecosystem supporting the grid: nearshore coral reef (U.S. Virgin Islands, Florida), Eastern coastal wetlands and forests (Maine, Rhode Island), and Blue Ridge highlands (Western Maryland, Appalachian Trail). The technology is not "moving through" these ecosystems as a single consumer moves through a transmission envelope. The ecosystem and the technology must coexist for the duration of the technological regime. And the cumulative impact caused by this co-existence requires a strict adherence to NEPA, including the creation of no categorical exceptions when a cumulative impact is present.

¹⁹See In Re Petition for Rulemaking of Public Employees for Environmental Responsibility, *Opposition of Global Crossing Ltd.* (RM-9913)(Aug. 14, 2000) at 8.